

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

75-7532

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United States Court of Appeals
FOR THE SECOND CIRCUIT

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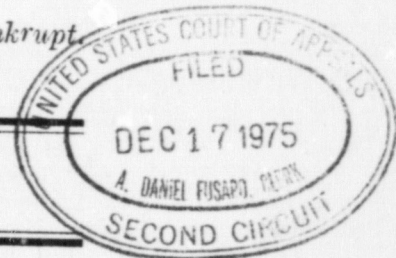
IN THE MATTER

of

AIRSPUR CORPORATION A/K/A
AIRSPUR NEW YORK,

Bankrupt

BRIEF OF THE APPELLEE
OHIO REAL PROPERTY, INC.



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of :

AIRSPUR CORPORATION A/K/A :
AIRSPUR NEW YORK, :

Docket No. 75-7532

Bankrupt. :
:

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BRIEF OF THE APPELLEE
OHIO REAL PROPERTY, INC.

STATEMENT OF ISSUE

This brief is submitted on behalf of the Appellee Ohio Real Property, Inc. solely with respect to the issue of whether the Bankruptcy Court has in personam jurisdiction over Ohio Real Property, Inc. with respect to the Trustee's Counterclaims when an Order was entered subrogating the claim of Ohio to L. J. Rauth as Trustee prior to the service and filing of the Counterclaims.

STATEMENT OF THE CASE

The Appellee Ohio Real Property, Inc. together with Appellees Bankers Trust Co. and Mercantile Commerce Company has filed a joint brief on the issues on appeal involving the summary jurisdiction of the Bankruptcy Court to hear the

Trustee's Counterclaims and whether, in the exercise of discretion, jurisdiction should be deferred to the Supreme Court of the State of New York.

In addition to these issues Ohio contended in the Courts below that, by reason of the Order of the Bankruptcy Court dated April 21, 1972 which subrogated L. J. Rauth to the rights of Ohio, Ohio was not a party to the Bankruptcy proceedings when the counterclaim was filed and is not subject to the Court's jurisdiction.

The Bankruptcy Referee did not reach any decision on this issue. The District Court (Tenney, J.) by Order dated August 6, 1975 while noting the assignment and subrogation held:

"In view of this Court's disposition on the Appeal, determination of that matter is not necessary." (Footnote 2, p. 328a*)

If this Court determines that the Bankruptcy Court has subject matter jurisdiction over the Counterclaims and that the Court should not dismiss in the exercise of discretion then the issue of the Court's jurisdiction over Ohio must be considered.

* All references are to pages in the Joint Appendix.

SUMMARY STATEMENT

On July 24, 1969 Ohio Real Property, Inc. ("Ohio") invested some \$152,000 in Airspur Corporation ("Airspur"). Airspur was a corporation organized under the laws of Delaware on November 18, 1968 with its principal place of business at Ten Rockefeller Plaza, New York, New York. On July 15, 1969, Airspur filed its certificate of doing business in New York. Airspur operated as a viable corporation for approximately one year after the investment.

On June 30, 1970 Airspur filed a petition for an Arrangement under Chapter XI of The Bankruptcy Act and on August 31, 1970 Airspur was adjudicated a bankrupt.

Following adjudication Ohio duly filed its Proof of Claim together with the Note upon which said claim is predicated. (pp 90a-91a) L. J. Rauth as Trustee was subrogated to this claim and substituted as claimant pursuant to an assignment by Ohio dated March 24, 1972 and an Order of this Court dated April 21, 1972. (pp 95a-102a)

On September 6, 1972 four months after the Order of Subrogation was entered, the Trustee in Bankruptcy filed with the Court a document entitled "Objection to Claim and Offsets, Counterclaim and Request for Affirmative Judgment" directed against the claim (No. 229) of Ohio Real Property, Inc. At or about the same time the Trustee instituted an

action in the Supreme Court of the State of New York, County of New York against various individuals, various officers and directors of Airspur and some of the Group B Stockholders including Ohio.

THE ORDER BELOW

In November of 1972 the appellants and Mercantile, Chemical, and Bankers Trust moved to dismiss the counterclaims. Argument before the Bankruptcy Judge took place and the matters were submitted in April of 1973. The lower court did not render its Opinion and Order until August of 1974.

In the Order of August 28, 1974, the Bankruptcy Court below ruled against Ohio on the issue of subject matter jurisdiction and did not comment on the issue of in personam jurisdiction over Ohio. As noted the District Court did not reach the point, having dismissed on the issue of the summary jurisdiction of the Bankruptcy Court.

POINT I

THE COUNTERCLAIM SHOULD
BE DISMISSED AS TO OHIO
FOR LACK OF IN PERSONAM
JURISDICTION

Even assuming that the Bankruptcy Court has summary jurisdiction to hear the Counterclaims, and further that in the exercise of discretion the matter should not be dismissed in the exercise of discretion the matter must be dismissed as to Ohio for want of in personam jurisdiction.

Sitting in Bankruptcy, this Court can only hear those matters in which Congress has by statute conferred jurisdiction. The extent of the Court's jurisdiction is set out in Section 2 of The Bankruptcy Act (11 U.S.C. 11) which specifically invest the Court with the authority to:

"Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates"

There is no authority for the Bankruptcy Court to hear and determine suits for damages by the bankrupt against a creditor or third party where the act for which relief is sought is other than a mandatory counterclaim. In fact Congress has specifically provided that where the trustee asserts a claim on behalf of the bankrupt against a third party:

"Suits * * * shall be brought or prosecuted only in the Courts where the bankrupt might have brought or prosecuted them if proceedings under this act had not been instituted."
[11 U.S.C. 46(b)]

The law is clear that a counterclaim can only lie if it involves a preference (11 U.S.C. 96), voidable lien (11 U.S.C. 107), setoff (11 U.S.C. 108) or a fraudulent transfer (11 U.S.C. 110) Katchen v. Landy (382 U.S. 323, 1966), and that such a counterclaim can by definition lie only against a claimant.

However, as of April 21, 1972 Ohio ceased to be the claimant by virtue of the Order of Subrogation. It had divested itself of all its interest in Airspur and the Bankruptcy Court without objection from the Trustee ordered the subrogation. L. J. Rauth as Trustee became the owner of the claim by virtue of the assignment. The Bankruptcy Court has the jurisdiction and in this matter did hear whether the assignee should be subrogated to the assignor. Once the Court so finds, the assignee becomes the rightful claimant. Thus the Order of the Bankruptcy Court Ohio ceased to be the claimant and ceased to be subject to the jurisdiction of the Court.

CONCLUSION

Ohio Real Property, Inc. respectfully submits that should this Court find Summary Jurisdiction existed over claimants with respect to the Crossclaims, and that the Court should not in its discretion defer jurisdiction, then the Counterclaim against Ohio must still be dismissed for want of in personam jurisdiction of the Court over Ohio.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of
AIRSPUR CORPORATION A/K/A
AIRSPUR NEW YORK,
Bankrupt.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes
and says that he is over the age of 18 years. That on the 17th
day of December, 1975, he served two copies of the
Brief of Appellee Ohio Real Property, Inc. on
See attached list

the attorney s for ~~the~~ see attached list
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney s at
No. See attached list () N. Y.,
that being the address designated by them for that purpose upon
the preceding papers in this action.

David F. Wilson

Sworn to before me this

17th day of December, 1975.

Courtney J. Brown
COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976

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Due and timely service of Two copies
of the within ~~BRAR~~ is hereby
admitted this 17th day of DECEMBER 1975

.....
Attorney for APPELLANT